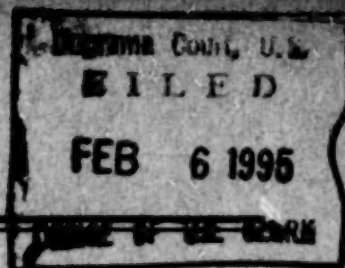


(5)
No. 94-500



IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ERICH E. and HELEN B. SCHLEIER,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether age discrimination in violation of the duty imposed by the Age Discrimination in Employment Act of 1967 is a tort-like personal injury, entitling victims to exclude settlement amounts from their gross income as "damages received . . . on account of personal injuries" under Section 104(a)(2) of the Internal Revenue Code.

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Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Erich Schleier was fired by United Air Lines, Inc. ("United") when he became 60 years old. Mr. Schleier and others sued United for age discrimination, seeking lost earnings, liquidated damages, injunctive relief, and other relief. (Nos. 79C 360 and 79C 1572, N.D. Ill., Tax Ct. Pet. Ex. B.) A jury found that the airline had engaged in willful misconduct in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (the "ADEA"), but the decision was reversed and remanded by the Seventh

Circuit Court of Appeals. *See Monroe v. United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985). Before a second trial, the parties settled. (Tax Ct. Pet. at 2-4.)

The settlement released United from all claims that each plaintiff “ever had or now has under the Age Discrimination in Employment Act, state age discrimination laws, or the common law of any state regarding wrongful or unlawful discharge. . . .” Mr. Schleier received settlement payments allocated equally between “back pay” and “liquidated damages.” The amount denominated “back pay” represented damages measured by the lost earnings Mr. Schleier would have received had there been no discrimination. It did not represent additional compensation for any services he performed in United’s employ. (Tax Ct. Pet. Ex. C.)

The settlement agreement stipulated that the amounts allocated to ADEA liquidated damages were not subject to payroll or income tax withholding. United wrote separate checks for Mr. Schleier’s lost earnings and liquidated damages, calling the latter amount “liquidated damages.” United did not withhold any payroll or income taxes from the amount of the settlement allocated to Mr. Schleier’s ADEA liquidated damages. (Tax Ct. Pet. Ex. D).

When he filed his 1986 federal income tax return, Mr. Schleier paid tax on his ADEA lost earnings damages but excluded the ADEA liquidated damages from his gross income. Petitioner issued a statutory notice of deficiency on September 17, 1990, proposing to tax Mr. Schleier’s ADEA liquidated damages. (Tax Ct. Pet. Ex. A.) In his petition to the Tax Court, Mr. Schleier alleged error with respect to the taxation of his ADEA liquidated damages and asked for a refund of tax on the part of his ADEA settlement allocable to his lost earnings. (Tax Ct. Pet. at 2.)

The Tax Court held that all of Mr. Schleier’s ADEA settlement was excludable from his income under Section 104(a)(2) of the Internal Revenue Code.¹ The Fifth Circuit Court of Appeals affirmed, declining petitioner’s suggestion for a hearing *en banc*.

SUMMARY OF ARGUMENT

1. Section 104(a)(2) excludes from gross income “any damages received . . . on account of personal injuries.” (Emphasis added.) The regulations interpret this rule to include amounts received in settlement of a lawsuit involving “tort or tort type rights.” Treas. Reg. § 1.104-1(c). Harmonizing the statutory requirement of a personal injury and the regulation’s element of tort or tort-type rights, *United States v. Burke*, 112 S.Ct. 1867 (1992), emphasized that excludable personal injury damages are associated with remedial schemes offering jury trials and damages beyond lost wages. These elements, whose absence determined the taxation of damages under pre-1991 Title VII in *Burke*, are both present in the ADEA. 29 U.S.C. §§ 626(b), 626(c). ADEA liquidated damages compensate for difficult to measure injuries consequent to the act of discrimination, thereby offering a range of damages as required by *Burke*. Moreover, the punitive aspect of ADEA liquidated damages conceded by petitioner satisfies one of the indicia of tort-type rights identified by this Court in *Burke*.

The policy of Section 104(a)(2), extending legislative compassion to victims of tort-type injuries, is consistent with

¹ References to the “Code” are to the Internal Revenue Code of 1954, as amended and in effect for the taxable year 1986. The amendment of Section 104(a) made in 1989 was prospective. *See Omnibus Budget Reconciliation Act of 1989*, Pub. L. No. 101-239, 103 Stat. 2106, § 7641.

excluding ADEA damages from a victim's income and realizes the humanitarian objectives of the ADEA.

2. Petitioner's theory that liquidated damages are exclusively punitive under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (the "FLSA"), and the ADEA misreads *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), contravenes the views of circuit courts of appeals, and cannot be reconciled with legislative history. The case relied on by petitioner to exemplify the proper tax treatment of ADEA damages, *Downey v. Commissioner*, 97 T.C. 150 (1991), *supp. op.*, 100 T.C. 634 (1993), *rev'd*, 33 F.3d 836 (7th Cir. 1994), *petition for cert. pending*, No. 94-999, reached its holding by failing to follow the decisions of this Court.

Furthermore, as shown by the internal contradictions in petitioner's brief, the conflicts between petitioner's statements to this Court and her arguments below, and the diametric opposition of her FLSA theory to the official agency view promulgated in Rev. Rul. 69-581, 1969-2 C.B. 25, petitioner has sacrificed doctrinal consistency in pursuit of a reversal. However, result-oriented litigation will exacerbate uncertainty among taxpayers and promote the uneven application of revenue laws. An arbitrary checkerboard of taxable and tax-exempt remedies under antidiscrimination statutes and other tort-type laws will discourage victims of discrimination from effectively exercising their rights.

3. Petitioner's alternative argument, that the ADEA liquidated damages portion of Mr. Schleier's settlement was not "on account of" any personal injury because of the allegedly exclusively punitive character of ADEA liquidated damages, conflicts with the legislative history and court decisions that consider ADEA liquidated damages at least partially compensatory. Although the tax treatment of purely punitive tort damages is not before the Court in Mr. Schleier's

case, the plain language and the policy of the statute support the inference from the 1989 tax amendment that pre-1989 punitive damages in personal injury cases are excludable from income, consistent with this Court's dictum in *Burke*, 112 S.Ct. at 1871 n. 6. The rationale relied on by some courts that have held to the contrary is conceptually unsound and irreconcilable with mainstream decisions under Section 104(a)(2).

ARGUMENT

I.

MR. SCHLEIER'S AGE DISCRIMINATION DAMAGES ARE EXCLUDABLE FROM HIS GROSS INCOME BECAUSE THEY WERE RECEIVED ON ACCOUNT OF PERSONAL INJURY IN A SUIT INVOLVING TORT OR TORT-TYPE RIGHTS.

A. Introduction.

The concept of gross income is broadly construed in order to fulfill the legislative policy of taxing all accessions to wealth, regardless of the source from which they are derived. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 429 (1955). Exclusions from gross income should be recognized only where specifically mandated by Congress. *Id.* at 430.²

² Despite the admonition of *Glenshaw Glass Co.* that exclusions from income require congressional action, the Internal Revenue Service has unilaterally excluded from income many categories of meliorative payments even in the absence of express legislative authorization. See, e.g., Rev. Rul. 76-144, 1976-1 C.B. 17; Rev. Rul. 74-153, 1974-1 C.B. 20; Rev. Rul. 74-74, 1974-1 C.B. 18; Rev. Rul. 70-280, 1970-2 C.B. 13; Rev. Rul. 69-212, 1969-2 C.B. 34; Rev. Rul. 63-136, 1963-2 C.B. 19; Rev. Rul. 58-370, 1958-2 C.B. 14; Rev. Rul. 57-102, 1957-1 C.B. 26; Rev. Rul. 56-518, 1956-2 C.B. 25; Rev. Rul. 55-652, 1955-2 C.B. 21; and Rev. Rul. 55-132,

(continued...)

The tax code has recognized numerous exclusions from gross income.³ The exclusion for damages received on account of personal injuries or sickness was enacted as part of the Revenue Act of 1918, 40 Stat. 1065-66 (1919), and has been retained in every codification of the tax law with essentially no change in the relevant statutory language: "[G]ross income does not include . . . the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." Code, § 104(a)(2).⁴ For the past four decades the Treasury Regulations have interpreted this exclusion to include amounts received in

² (...continued)

1955-1 C.B. 213. Section 104(a)(2) or its predecessors were not cited as the basis for exemption in these rulings.

³ Among other things, the Internal Revenue Code in effect for 1986 excluded from gross income certain prizes and awards made in recognition of religious, scientific, artistic, and similar achievement, § 74; certain group term life insurance purchased for employees, § 79; death benefits and life insurance proceeds, § 101; gifts and inheritances, § 102; interest on state and local bonds, § 103; payments received under certain accident and health plans, § 105; employer contributions to accident and health plans, § 106; income from discharge of indebtedness, § 108; certain combat pay to members of the Armed Forces, § 112; mustering-out payments for members of the Armed Forces, § 113; certain dividends received by individuals from qualifying corporations, § 116; meals and lodging furnished to employees for the convenience of their employer, § 117; and certain scholarships and fellowships, § 119.

⁴ Section 213(b)(6) of the original legislation had phrased the exclusion in similar language that was retained until the enactment of the Internal Revenue Code of 1954: "[G]ross income" does not include . . . [a]mounts received . . . as compensation for personal injuries . . . plus the amount of any damages received whether by suit or agreement on account of such injuries." Despite its slightly different wording, the 1954 codification was intended to be synonymous with the provision under prior law. H.R. Rep. No. 1337, 83d Cong., 2d Sess., reprinted in 1954 U.S. Code, Cong. & Admin. News, at 4168-4169.

settlement of a lawsuit involving "tort or tort type rights." Treas. Reg. § 1.104-1(c).⁵

An amount may be excluded from income under Section 104(a)(2) even though it compensates the victim for lost earnings that would have been subject to tax absent the tortious injury. See, e.g., *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980); *Burke*, 112 S.Ct. at 1880 (O'Connor, J., dissenting); *Roemer v. Commissioner*, 716 F.2d 693 (9th Cir. 1983);⁶ *Threlkeld v. Commissioner*, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988); *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989). Far from challenging this principle, the Internal Revenue Service embraces it. Thus, Revenue Ruling 93-88, 1993-2 C.B. 61, applied the principle in a post-*Burke* analysis of various damages under federal antidiscrimination statutes (Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981a, 2000e-2000e-17), the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, and Section 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981):

Compensatory damages, including back pay, received in satisfaction of a claim of racial discrimination under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of

⁵ Petitioner erroneously dates the adoption of the pertinent regulations to 1960. Pet. Br. at 14 n. 5. The final regulations were promulgated on April 13, 1956, by Treasury Decision 6169, 21 F.R. 2432, with no changes to the relevant language in the regulations proposed on March 24, 1955. See 20 F.R. 1779 (1955).

⁶ The position of the Internal Revenue Service is that it "will not follow the opinion of the United States Court of Appeals in *Roemer v. Commissioner*," Rev. Rul. 85-143, 1985-2 C.B. 55, although it is not exclusion of lost earnings with which the government quarrels, see *id.* at 56. *Roemer* was cited with apparent approval by this Court in *Burke*, 112 S.Ct. at 1871 n. 6. Presumably, the government also rejects *Threlkeld*, which was not cited in its brief.

1964 are excludable from gross income as damages for personal injury under Section 104(a)(2) of the Code. *This is true even if the compensatory damages in such a case are limited to back pay.*

Id. at 63 (emphasis added); see also Rev. Rul. 85-97, 1985-2 C.B. 50. The same point was conceded by petitioner before the court below: “[I]f . . . a victim of age discrimination has suffered a tort-type personal injury, . . . the back pay portion of an ADEA award would definitely be excludable from gross income” *Schleier v. Commissioner*, 5th Cir. No. 93-5555, Brief for the Appellant, at 28 n. 16; see also *Schmitz v. Commissioner*, 34 F.3d 790, 794 n.4 (9th Cir. 1994) (“The Commissioner . . . conceded that, if ADEA creates a tort-like cause of action, the Schmitzes’ back pay or non-liquidated damages are excludable.”).

B. Mr. Schleier Received Damages on Account of the Personal Injury of Age Discrimination.

Mr. Schleier suffered a personal injury when he became the victim of age discrimination. Petitioner concedes that “discrimination based upon age can effect ‘personal’ injuries” and that “personal injuries may be presumed to exist, in varying degrees, in any employment discrimination case.” Pet. Br. at 10, 25 n. 15. Petitioner has not argued that Mr. Schleier did not suffer a personal injury.

This Court recognizes that age discrimination entails more than the loss of a contract right. Arbitrary age discrimination “inflict[s] on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations.” *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (emphasis added). Greater than the economic loss associated with age discrimination “is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and

their families.” *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 410 n. 13 (1985), quoting H.R. Doc. No. 40, 90th Cong., 1st Sess., 7 (1967), and EEOC, *Legislative History of the Age Discrimination in Employment Act* 61 (1967). Age discrimination “can cause hardships for older persons through loss of roles,” *Criswell*, 472 U.S. at 411, quoting H.R. Rep. No. 95-527, pt. 1, at 2 (1977), and “[has] a devastating effect on the dignity of the individual.” *Criswell*, 472 U.S. at 410.⁷

The views of this Court and petitioner’s concession of the personal injury of age discrimination are consistent with the legislative focus of the Age Discrimination in Employment Act of 1967, which presumed that age discrimination in employment caused human suffering.

The financial and social costs, . . . are nothing compared with the costs in terms of human suffering and welfare which come about as the result of discriminatory practices in employment because of age. . . . Self-esteem, self-satisfaction, and personal security are important byproducts of employment in industrial America. To deny a person the opportunity to compete for jobs on the basis of ability and desire, solely because of unfounded age prejudice, is a most vicious, cruel, and disastrous form of inhumanity.

113 Cong. Rec. 34745 (December 4, 1967) (statement of Rep. Eilberg). In *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (June 1965), the Secretary of Labor described the problems encountered by older persons in finding and

⁷ Compare *Burke*, 112 S.Ct. at 1872 (“It is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is, as respondents argue and this Court consistently has held, an invidious practice that causes grave harm to its victims.”).

retaining employment. That report influenced passage of the ADEA in 1967, based on congressional findings that:

[O]lder workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; . . . the incidence of unemployment . . . with resultant deterioration of skill, morale, and employer acceptability is . . . high among older workers; their numbers are great and growing; and their employment problems grave.

29 U.S.C. § 621(a).

Mr. Schleier sought redress for his injuries under the ADEA, which imposes an extra-contractual duty on employers to refrain from discriminating against current or potential employees. His claims were based on age discrimination. He did not seek damages for breach of contract or for lost pension, nor did his settlement release the airline from such claims.

C. This Court's Analysis in *Burke* and the Majority of the Lower Courts That Have Considered the Issue Confirm That ADEA Damages Are Excludable from Income.

The courts of appeals for the Third, Fifth, Sixth, and Ninth Circuits, as well as the Tax Court, the Court of Federal Claims, and several district courts, have concluded that ADEA damages are excludable under Section 104(a)(2). *Schmitz v. Commissioner*, 34 F.3d 790; *Schleier v. Commissioner*, 5th Cir. 93-5555; *Pistillo v. Commissioner*, 912 F.2d 145 (6th Cir. 1990); *Rickel v. Commissioner*, 900 F.2d 655 (3d Cir. 1990); *Purcell v. Seguin State Bank and Trust Co.*, 999 F.2d 950 (5th Cir. 1993); *Redfield v. Insurance Co. of North America*, 940 F.2d 542 (9th Cir. 1991); *Bennett v. United States*, 30 Fed. Cl. 396 (1994), *appeal pending*, Fed. Cir. No. 94-5107; *Keller v. Commissioner*, 62 T.C.M. 401 (1991), *aff'd in unpublished decision*, 34 F.3d 1072 (9th Cir.

1994), *petition for cert. pending*, No. 94-944; *Rice v. United States*, 834 F. Supp. 1241 (E.D. Cal. 1993), *aff'd in unpublished decision*, 35 F.3d 571 (1994), *petition for cert. pending*, No. 94-944; *Klein v. Secretary of Transportation*, 807 F. Supp. 1517 (E.D. Wash. 1992).⁸ At least two other courts of appeals have implied that they agree with the decisions excluding ADEA damages from income. *See Commissioner v. Miller*, 914 F.2d 586, 591 n. 8 (4th Cir. 1990); *Reese v. United States*, 24 F.3d 228, 234 (Fed. Cir. 1994). Other courts that have considered age discrimination claims under other state or federal laws have found the respective damages to be excludable from income. *See Abrams v. Lightolier*, 841 F. Supp. 584 (D.N.J. 1994) (state age discrimination statute); *Madson v. Commissioner*, 55 T.C.M. 1351 (1988) (age discrimination in violation of equal protection).

The Court's opinion in *Burke*, 112 S.Ct. 1867, confirms the correctness of the results reached by these courts. In the first place, *Burke* cited with approval *Rickel v. Commissioner*, 900 F.2d 655, the first decision to hold that lost wages⁹ under the ADEA were excludable from income. *See* 112 S.Ct. at 1871 n. 6. More importantly, *Burke's* analysis

⁸ *But see Downey v. Commissioner*, 97 T.C. 150 (1991), *supp. op.*, 100 T.C. 634 (1993), *rev'd*, 33 F.3d 836 (7th Cir. 1994), *petition for cert. pending*, No. 94-999; *Maleszewski v. United States*, 827 F. Supp. 1553 (N.D. Fla. 1993) (lost earnings and pension received in ADEA settlement, *held* includable in income); *Shaw v. United States*, 853 F. Supp. 1378 (M.D. Ala. 1994) (liquidated damages received in ADEA settlement, *held* includable in income, following *Maleszewski*); *Drase v. United States*, 866 F. Supp. 1077 (N.D. Ill. 1994).

⁹ The appellate case dealt only with lost wages because the Commissioner did not appeal the holding of the Tax Court that ADEA liquidated damages were excludable from income. *Rickel*, 900 F.2d 655.

of Title VII and other remedial schemes demonstrates that Mr. Schleier's damages were received in a suit involving tort or tort-type rights. R. Wood, *Taxation of Damage Awards and Settlement Payments* at 3-12, ¶ 3.23 (1994 Supp.).¹⁰

Burke added a crucial insight to the jurisprudence that had emerged in prior case law. The remedial schemes in such cases as *Threlkeld*, 848 F.2d 81, had permitted courts to take for granted the presence of a personal injury (or absence, see *Starrels v. Commissioner*, 304 F.2d 574 (9th Cir. 1962), and the existence (or non-existence) of a tort or tort-type right. In *Burke*, however, this Court confronted an apparent paradox: an instance of discrimination that seemed to meet the *Threlkeld* definition of a personal injury as "any invasion of the rights that an individual is granted by virtue of being a person in the sight of the law," 87 T.C. at 1308 (footnote omitted), without conferring upon the victim tort-like rights of remediation.

Burke's test for exclusion under Section 104(a)(2) harmonizes the words of the statute ("damages received . . . on account of personal injuries . . .") with the language of the regulations (damages must be received through prosecution of a legal suit or action "based upon tort or tort type rights"). Interpreting "§ 104(a)(2) and applicable regulations," 112 S.Ct. at 1874, as a unity, the *Burke* majority revealed *Threlkeld's* concept of a personal injury to be a necessary but not a sufficient condition for the exclusion of damages under Section 104(a)(2).

Burke identified two additional necessary factors: (i) the fact-finding process must provide the opportunity for a trial

¹⁰ The Third Circuit inferred additional support for the exclusion of ADEA damages from the legislative history of the 1989 amendment. See *Rickel*, 900 F.2d at 664.

by jury, and (ii) the spectrum of possible recoveries must do more than restore a victim's lost wages. *Burke*, 112 S.Ct. at 1873-1874; *Schmitz*, 34 F.3d at 794. The Court would not have singled out these two factors and cited their application in so many contexts if they were not of paramount importance in applying Section 104(a)(2). Moreover, when both jury trials and non-wage damages are offered by the same remedial framework, the Court regarded the combination as the hallmark of a tort-like action. *Burke*, 112 S.Ct. at 1874 n. 12.

Although the petitioner would belittle the significance of the first factor in *Burke*,¹¹ in fact this Court referred to jury trials six times in three pages. See 112 S.Ct. at 1872-1874. The opinion began its contrast of Title VII and tort-like actions with the right to a jury trial: "Title VII plaintiffs, unlike ordinary tort plaintiffs, are not entitled to a jury trial." 112 S.Ct. at 1872 (emphasis added). The Court used jury trials to distinguish Title VII from the other federal antidiscrimination statutes which the Court was grouping with traditional tort law. 112 S.Ct. at 1873. *Burke* pointed to the 1991 change in law permitting jury trials as one of the two indicators "signal[ing] a marked change in [Congress'] conception of the injury redressable by Title VII." 112 S.Ct. at 1874 n. 12. The fact that the fair housing pro-

¹¹ Pet. Br. at 21 n. 11. Petitioner's assertion that a jury trial is a neutral factor also present in contract actions fails to account for why *Burke* emphasized the absence of a jury trial from pre-1991 Title VII and its presence in more tort-like antidiscrimination statutes. To the extent petitioner reduces ADEA damages to contract damages, petitioner ignores the fact that the ADEA imposes a "duty not to discriminate . . . regardless of the parties' contractual relationship." *Schmitz*, 34 F.3d at 793. On the other hand, her claim that ADEA liquidated damages are punitive disqualifies them as a contractual remedy. *Restatement (Second) of the Law of Contracts* at § 356 (1979).

visions of Title VIII of the Civil Rights Act of 1968 included a right to a trial by jury was cited by the Court as a reason why Title VIII "sounds basically in tort." 112 S.Ct. at 1874.

According to *Burke's* interpretation of the second factor, Section 104(a)(2) requires the remedial scheme to include some redress which does more than restore the victim's lost wages. The Court did not conclude that a statute had to offer the *full* range of monetary remedies featured in the most comprehensive tort laws before it could be considered an action for personal injury under Section 104(a)(2):¹²

The Court previously has observed that Title VII focuses on "legal injuries of an economic character," see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975), consisting specifically of the unlawful deprivation of full wages earned or due for services performed, or the unlawful deprivation of the opportunity to earn wages through wrongful termination. The remedy, correspondingly, consists of restoring victims, through backpay awards and injunctive relief, to the wage and employment positions they would have occupied absent the unlawful discrimination. See *id.*, at 421, 95 S.Ct. at 2373 citing (118 Cong. Rec. 7168 (1972)). *Nothing* in this remedial scheme purports to recompense . . . for *any* of the traditional harms associated with personal injury, *such as* pain and suffering, emotional distress, harm to reputation, *or other consequential damages*.

¹² *Burke* "does not require that a statute provide the complete spectrum of tort remedies before it may be deemed to redress a tort type injury." *Bennett v. United States*, 30 Fed. Cl. at 400. As Justice Souter cautioned, "[i]n those States that have barred recovery in tort for 'intangible elements of injury,' . . . the modified action is still fairly described as one 'based upon tort rights,' and certainly is an action based upon tort-type rights." *Burke*, 112 S.Ct. at 1877 n. (Souter, J., concurring).

112 S.Ct. at 1873 (emphasis added). By this language, the Court acknowledged that discrimination could constitute a personal injury for purposes of Section 104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy, and cited federal anti-discrimination statutes as illustrations of possibly qualifying remedial schemes. *Id.* at 1873-1874.

In contrast to pre-1991 Title VII remedies, ADEA liquidated damages satisfy the *Burke* requirement for a range of non-wage damages, 29 U.S.C. § 626(b), by compensating injured persons for damages "which are too obscure and difficult to prove." *Schmitz*, 34 F.3d at 794.¹³ Consonant with "the economic and psychological injury" of age discrimination, *EEOC v. Wyoming*, 460 U.S. at 231, and its "devastating effect on the dignity of the individual," *Criswell*, 472 U.S. at 410, the ADEA authorized victims of age discrimination to recover additional damages by reference to a pre-existing provision of the Fair Labor Standards Act that had been interpreted to connote "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (citations omitted); *Overnight Motor Transportation Co., Inc. v. Missel*, 316 U.S. 572, 583-584 (1942)

¹³ Petitioner erroneously portrays *Schmitz* as having rejected a punitive role for ADEA liquidated damages: "The [*Schmitz*] court stated that liquidated damages under the ADEA are compensatory *rather than* punitive . . ." Pet. Br. at 9 (emphasis added). However, nothing in the *Schmitz* opinion supports petitioner's misreading. On the contrary, the Ninth Circuit Court of Appeals took pains to stress that "[t]he case law and legislative history indicate that ADEA liquidated damages have a compensatory *as well as a punitive purpose*." 34 F.3d at 793 (emphasis added). "[W]e do not agree that ADEA liquidated damages are *solely* punitive in nature . . ." *Id.* at 794 (emphasis added). "ADEA liquidated damages likely also have a punitive purpose . . ." *Id.* at 795.

("[L]iquidated damages . . . are compensation, not a penalty or punishment by the Government. . . . The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.")¹⁴

If Congress had wished to provide for an exclusively punitive remedy in the ADEA, it could just as easily have authorized victims of age discrimination to recover "fines," "penalties," "exemplary damages," or "punitive damages." Instead, Congress chose "liquidated damages," a pre-existing term of art under the FLSA. The ADEA's "remedial provisions incorporate by reference the provisions of the Fair Labor Standards Act of 1938," *McKennon v. Nashville Banner Pub. Co.*, No. 93-1543, slip op. at 4 (S.Ct. January 23, 1995), ". . . to the greatest extent possible." *Lorillard v. Pons*, 434 U.S. 575, 582 (1978). Having incorporated those provisions, it is fair to assume that Congress intended to adopt existing interpretations of the meaning of those provisions. *Standard Oil v. United States*, 221 U.S. 1, 59 (1911); *Gilbert v. United States*, 370 U.S. 650, 655 (1962).

¹⁴ Congress stated it was relying on this view when it amended the ADEA in 1978:

The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages *because* the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Transportation Company [sic] v. Missel*, 316 U.S. 572, 583-84 (1942).

H.R. Rep. 95-950 (conf.) at 13, 14 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 528, at 535 (emphasis added); see also 124 Cong. Rec. S4449 (daily ed. March 23, 1978) (statement of Sen. Williams).

ADEA liquidated damages thus bear a close resemblance to presumed damages:

Presumed damages are a *substitute* for ordinary compensatory damages, not a *supplement* for an award that fully compensates the alleged injury. When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate. . . . In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure.

Memphis Community School Dist. v. Stachura, 477 U.S. 299, 310 (1986) (citations omitted; emphasis in original).¹⁵ In contrast to pre-1991 Title VII, the ADEA "purports to recompense . . . for . . . other consequential damages." *Burke*, 112 S.Ct. at 1873.

Moreover, *Burke* acknowledged the possibility that a remedial scheme providing for damages of a punitive character could satisfy the requisite tort-like framework for purposes of Section 104(a)(2): "[I]n contrast to the tort remedies for physical and non-physical injuries discussed above, Title VII does not allow awards for compensatory or punitive damages." 112 S.Ct. at 1873 (emphasis added). Congress' decision to permit jury trials and compensatory "as well as punitive damages" under the Civil Rights Act of 1991 signaled a marked change in its conception of the injury redressable by Title VII. 112 S.Ct. at 1874 n. 12. The Court

¹⁵ The government's misconception that excludable Section 104(a)(2) damages must separately compensate for intangible injury leads it to cite such cases as *Hill v. Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983), for the proposition that evidence of intangible injury is not admissible in ADEA cases. Pet. Br. at 18-19. However, that simply begs the question of whether ADEA remedies already include presumed damages for intangible harms.

pointed out that Title VIII of the Civil Rights Act of 1968 sounded basically in tort, combining jury trials with awards of compensatory "and punitive damages." 112 S.Ct. at 1874. These observations are consistent with the previously expressed view of this Court that "[p]unitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Thus, petitioner's argument that ADEA liquidated damages punish highlights an additional tort-like facet of the ADEA.¹⁶

The ADEA offers both jury trials and non-wage damages. 29 U.S.C. §§ 626(b), 626(c). "ADEA's liquidated damages provision, as well as its provision for jury trials, distinguishes ADEA from the statute discussed in *Burke*." *Schmitz*, 34 F.3d at 793. Therefore, by application of the *Burke* criteria sought for but not found under pre-1991 Title VII, the damages received by Mr. Schleier on account of his personal injuries were also received in prosecution of a suit based on tort-type rights.

D. The Policy of Section 104(a)(2) Justifies Exclusion of ADEA Damages from Gross Income.

A clear understanding of the policy of Section 104(a)(2) is essential to a consistent application of the exclusion. However, the legislative reason for retaining the exclusion for personal injury damages has evolved since the House Ways and Means Committee provided the following explanation for the enactment of Section 213(b)(6) of the Revenue Act of 1918:

¹⁶ Before the court below, petitioner had conceded that the awarding of liquidated damages "on a punitive damages standard" was a "tort-like" aspect of the ADEA." *Schleier*, 5th Cir. No. 93-5555, Reply Brief for the Appellant at 14.

Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are to be included in gross income. The proposed bill provides that such amounts shall not be included in gross income.

H.R. Rep. No. 767, 65th Cong., 2d Sess., at 9-10 (1918), reprinted in 1939-1 C.B. (Pt. 2) at 92. The policy that personal injury¹⁷ damages should not be taxed appears to have originated in a mistaken notion that they could not be taxed, reflecting the narrow definition of income as "gain derived from capital, from labor, or from both combined," that was endorsed by this Court in *Eisner v. Macomber*, 252 U.S. 189, 207 (1920), citing *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1920), and *Stratton's Independence v. Howbert*, 231 U.S. 399, 415 (1913); see also B. Bittker & L. Lokken, *Federal Taxation of Income, Estates and Gifts*, ¶¶ 5.1, 5.6 (2d ed. 1989).

In 1918 the Commissioner of Internal Revenue had stated:

¹⁷ The Revenue Act of 1918 did not define "personal injuries." However, accepted legal usage understood the phrase to encompass both tangible and intangible harms. See e.g., *Black's Law Dictionary* 627 (2d ed. 1910):

[T]he term is also used (chiefly in statutes) in a much wider sense, and as including any injury which is an invasion of personal rights, and in this signification it may include such injuries as libel or slander, criminal conversation with a wife, seduction of daughter, and mental suffering.

Accord, *Black's Law Dictionary* 967 (3d ed. 1933); *Vicksburg & Meridian R.R. v. Putnam*, 118 U.S. 545, 554 (1886); *Garrison v. Burden*, 40 Ala. 513, 516 (1867); *Bennett v. Bennett*, 116 N.Y. 584, 587 (1889); *Williams v. Williams*, 20 Col. 51, 67 (1894); *Morton v. Western Union Telegraph Co.*, 130 N.C. 299, 302 (1902); *McDonald v. Brown*, 23 R.I. 546, 549-550 (1902).

The Attorney General has advised upon the basis of recent decisions of the Supreme Court . . . and it is accordingly held that the proceeds of an accident insurance policy received by an individual on account of personal injuries sustained by him through accident are not income under the [Revenue Acts of 1916 and 1917].

It is held upon similar principles that an amount received by an individual as the result of a suit or compromise for personal injuries sustained by him through accident is not income taxable under the provisions of said Titles.

Treasury Decision 2747 (July 12, 1918), reprinted in *Income Tax Service 1918* ¶ 3605 (Corporation Trust Company 1918). Combining at times a metaphor of "human capital" with the narrow view of income, early administrative interpretations converged on the view that damages for intangible personal injuries were not taxable, after initially reaching a contrary conclusion.¹⁸

¹⁸ Petitioner erroneously suggests that between 1920 and 1972 the Internal Revenue Service regarded damages for intangible injuries as taxable. See Pet. Br. at 12 n. 3. Sol. Mem. 1384, 2 C.B. 71 (1920), had taken the view that "alienation of a wife's affections is a personal injury" and that the statutory language "would seem to include any personal injury," but it declined to apply the exclusion, on the ground that a wife's affections did not constitute capital. However, Sol. Mem. 1384 was soon abandoned. See Sol. Op. 132, I-1 C.B. 92, 93 (1922), where the government held that damages for libel and for alienation of affections were not taxable under prevailing concepts of income and the Sixteenth Amendment. Sol. Op. 132 was incorrectly cited by petitioner as though it continued the position of Sol. Mem. 1384, whereas it formally revoked the latter. Petitioner compounds her error of misapprehending the significance of Sol. Op. 132 by suggesting that the "physical injury only" view held sway until a 1972 acquiescence. That this is a mistake may be seen from Rev. Rul. 58-418, 1958-2 C.B. 18, 19 (portion of libel settlement held excludable from income), superseded by Rev. Rul. 85-98, 1985-2 C.B. 51; see also *Seay v. Commissioner*, 58 T.C. 32, 40 (1972) ("[the government (continued...)]

The early view of income as gain from capital or labor has been displaced by an all-embracing concept of income as "any accession to wealth." *Glenshaw Glass Co.*, 348 U.S. at 431; *Commissioner v. Kowalski*, 434 U.S. 77, 94 (1977). There can no longer be any suggestion that the Section 104(a)(2) exclusion is grounded in a limitation on the reach of "income."

Modern courts have noted the role of compassion in Section 104(a)(2). In his dissenting opinion in *Norfolk & Western Ry. Co.*, 444 U.S. at 501, Justice Blackmun suggested two probable reasons for the exclusion of wrongful death awards: In addition to simplifying a potentially complex and administratively burdensome system, "Congress may have intended to confer a humanitarian benefit on the victim or victims of the tort." *Id.* The Ninth Circuit Court of Appeals has explained the justification for Section 104(a)(2) similarly:

The rationale behind the exclusion of the entire award is apparently a feeling that the injured party, who has suffered enough, should not be further burdened with the practical difficulty of sorting out the taxable and nontaxable components of a lump-sum award.

¹⁸ (...continued)

has] long recognized that [damages for intangible personal injuries] were exempt from taxation"). In fact, the Service had acquiesced in the tax-free treatment of libel damages at least as early as 1928, consistent with Sol. Op. 132. VII-1 C.B. 14 (1928) (acquiescence in *Hawkins v. Commissioner*, 6 B.T.A. 1023 (1927)). Even Rev. Rul. 74-77, 1974-1 C.B. 33, acknowledged that the position stated in Sol. Op. 132 was "set forth under the current statute and regulations in this Revenue Ruling," which reiterated the view that damages for alienation of affections or for the surrender of the custody of a minor child were excludable under Section 104(a)(2).

Roemer, 716 F.2d at 696. "Congress in its compassion has retained the exclusion (now codified at I.R.C. § 104(a)(2))." *Id.* n. 2.

Several courts have relied on a "return of capital"¹⁹ metaphor to distinguish the exclusion of compensatory damages from the taxation of purely punitive damages. See *Hawkins v. Commissioner*, 30 F.3d 1077 (9th Cir. 1994), *petition for cert. pending*, No. 94-1041; *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994). Others have stated more generally that a return of capital analogy justifies the Section 104(a)(2) exclusion because damages for personal injuries do not generate a gain or profit but only make the victim whole by compensating for a loss. See, e.g., *Starrels*, 304 F.2d at 576.²⁰ However, only a view of Section 104(a)(2) as legislative compassion can withstand intellectual scrutiny and be reconciled with the treatment of personal injury damages in the case law.

To begin with, any presumption that personal injuries do not generate a gain conflicts with *Glenshaw Glass Co.* because it suggests that Section 104(a)(2) implements an

¹⁹ The concept of return of financial capital is codified under Section 1001 and related sections, where "adjusted basis," Code § 1011, represents investment in property that has already been taxed and that must accordingly be subtracted from gross sales proceeds in order to determine the amount of gain realized. Treas. Reg. § 1.1001-1(a). "Capital" is exempt from tax when it is "returned" only to the extent it has an adjusted tax basis. Treas. Reg. § 1.1001-1(c).

²⁰ In the court below, the Commissioner conceded that the Section 104(a)(2) had been retained out of Congressional compassion but also averred that damages for personal injuries do not generate a gain or profit but only make the taxpayer whole by compensating for a loss. *Schleier*, 5th Cir. No. 93-5555, Brief for Appellant at 10.

inherent limitation on the scope of "income."²¹ Human beings have no tax basis in their health or personal interests. *Roemer*, 716 F.2d at 696 n. 2. Even if they did, damages in excess of such basis should be taxable as gain,²² unless Congress is presumed to have avoided administrative difficulties by retaining Section 104(a)(2) without dollar limits. However, the theory would then endow every human being at birth with a hypothetical, potentially infinite amount of previously taxed personal capital.²³

The return of capital analogy also conflicts with judicial precedent and administrative practice permitting the exclusion of personal injury damages based on lost earnings. *Burke* at 1880, (O'Connor, J., dissenting); *Schmitz*, 34 F.3d 790; *Roemer*, 716 F.2d 693; *Threlkeld*, 848 F.2d 81; *Wulf*, 883 F.2d 842. Revenue Ruling 93-88, 1993-2 C.B. 61, and Rev. Rul. 85-97, 1985-2 C.B. 50, would be indefensible if

²¹ The Court's observation in *Glenshaw Glass Co.* of a "long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital," 348 U.S. at 432 n. 8, "was probably intended only to distinguish the rulings, not to endorse them." Bittker & Lokken, *Federal Taxation of Income, Estates and Gifts* at 5-41.

²² The general basis recovery rules do not distinguish between voluntary and involuntary sales. Code §§ 1001, 1011. If similar treatment applied to corporeal capital, then a person who sold her own blood and "suffered pain and discomfort as the necessary and inevitable corollary of the means by which she chose to make her living," *United States v. Garber*, 589 F.2d 843, 847, *rev'd on other grounds*, 607 F.2d 92 (5th Cir. 1979), should be able to exclude the payments from her income. However, the courts reject the tax-free contractual recovery of human capital. 589 F.2d at 847. *Garber* noted without apparent disagreement the return of capital rationale, but it rested its holding on the absence of a tort. *Id.*

²³ Additional objections are noted in Dodge, *Taxes and Torts*, 77 Cornell L. Rev. 143, 152-154 (1992); Burke & Friel, *Tax Treatment of Employment-Related Injury Awards: The Need for Limits*, 50 Mont. L. Rev. 13, 52 (1989).

Section 104(a)(2) were based on a return of capital. "We doubt whether the return of capital theory justifies the exclusion from income of the full range of damages found to be excludable under section 104(a)(2), particularly damages received in lieu of lost income." *Downey*, 97 T.C. at 159.

On the other hand, a rationale for Section 104(a)(2) based on legislative compassion for tort victims avoids the conceptual difficulties of equipping each taxpayer with an infinite amount of previously taxed capital. Compassion for tort victims better accounts for the outcomes in *Garber*, 589 F.2d 843, and *Starrels*, 304 F.2d 574, by requiring the existence of a tort or tort-like event. Furthermore, it explains why, in appropriate circumstances, damages measured by lost earnings may be excluded from gross income.

No rational policy justifies denying to victims who seek relief for age discrimination under the ADEA the same compassionate treatment accorded plaintiffs under other federal antidiscrimination statutes, Rev. Rul. 93-88, 1993-2 C.B. 61, other state and federal age discrimination laws, *Abrams*, 841 F. Supp. 584, and *Madson*, 55 T.C.M. 135, and tort laws generally. In this case the focus of the tax statute furthers the humanitarian objectives of the ADEA.

II.

PETITIONER'S LITIGATING POSTURE IS WRONG AS A MATTER OF LAW AND FAILS AS POLICY.

A. Petitioner Mistakenly Relies on the Portal-to-Portal Act and *Thurston* to Extinguish a Dual Compensatory/Deterrent Role for ADEA Liquidated Damages.

The official view of the Internal Revenue Service for the past quarter-century repudiates petitioner's litigating theory (Pet. Br. at 21-24) that the Portal-to-Portal Act of 1947 (Act of May 14, 1947, ch. 52, § 11, 61 Stat. 89) changed the character of FLSA liquidated damages from compensatory

to punitive, making it "anachronistic error" to rely on *Brooklyn Savings Bank*, 324 U.S. 697, and *Overnight Motor Transportation Co., Inc.*, 316 U.S. 572. In Revenue Ruling 69-581, 1969-2 C.B. 25, 26, which has never been revoked but rather continues to inform agency policy,²⁴ the Service unequivocally stated its interpretation that FLSA liquidated damages are not punitive but compensatory:

The provisions of section 16(b) of the Fair Labor Standards Act of 1938, [sic] are not penal in nature. The liquidated damages provided for therein constitute compensation for delay in the payment of sums due under the Act. See *Overnight Motor Transportation Co., Inc.*, v. *Missel*, . . . and *Brooklyn Savings Bank v. O'Neil*.

Petitioner's claim, newly adopted for this Court,²⁵ is also

²⁴ The Internal Revenue Service has relied on the ruling's interpretation of the FLSA, see LTR 7923029 (March 7, 1979) ("The liquidated damages provided for in section 16(b) of the Fair Labor Standards Act of 1938 constitute compensation for delay in the payment of sums due under the Act."), and its holding generally, see LTR 9424008 (March 14, 1994) (deductibility of personal injury settlements). Written determinations may not be cited or relied on as precedents except by the taxpayers to whom they are issued. Code § 6110(j)(3). However, they are published by the Internal Revenue Service and they may illuminate the policies of the government. Furthermore, they may be helpful in establishing consistency of administrative treatment. *Rowan Companies v. United States*, 452 U.S. 247, 261 n. 17 (1981). Before the court below, petitioner herself cited *Brooklyn Savings Bank* and *Overnight Motor Transportation Co., Inc.* in support of her statement that FLSA damages are compensatory. *Schleier*, 5th Cir. No. 93-5555, Brief for the Appellant at 25.

²⁵ If the government's contention that *Schmitz* "erred in relying on *Brooklyn Savings Bank* and *Overnight Motor Transportation*," Pet. Br. at 21, is intended to suggest that the government had raised its Portal-to-Portal Act theory before that court, there is no evidence thereof. Similarly, the Fifth Circuit Court of Appeals had no opportunity to consider petitioner's new argument, but could reasonably have understood her to have been reaffirming

(continued...)

contradicted by long-standing views of the courts, which “have relied on the ADEA’s incorporation of FLSA remedies, see *Brooklyn [Savings] Bank v. O’Neil*, . . .” *Powers v. Grinnell Corp.*, 915 F.2d 34, 39 n. 6 (1st Cir. 1990), or held FLSA liquidated damages to be compensatory.²⁶

The function of petitioner’s Portal-to-Portal Act theory is to supply the needed “statutory context,” Pet Br. at 22-23, to allow her to argue that at the time the ADEA liquidated damages remedy was enacted, it could inherit nothing but a punitive residue from FLSA liquidated damages. Petitioner concedes thereby not only the relevance of the FLSA “statutory context” but also the fact that ADEA liquidated damages derive part of their character from FLSA damages. However, these concessions, when combined with Rev. Rul. 69-581, 1969-2 C.B. 25, negate any claim of an exclusively punitive role for ADEA liquidated damages.

As petitioner seems to recognize, *Thurston*, 469 U.S. 111, did not erase the pre-ADEA “statutory context.” Rather:

²⁵ (...continued)

the rationale of Rev. Rul. 69-581. See *Schleier*, 5th Cir. No. 93-5555, Brief for the Appellant at 25.

²⁶ See also *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1064 (2d Cir. 1988); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1299 (3d Cir. 1991); *Hamilton v. 1st Source Bank*, 895 F.2d 159, 166, vacated in part on rehearing and remanded, 928 F.2d 86 (4th Cir. 1990); *Reich v. Tiller Helicopter Services, Inc.*, 8 F.3d 1018, 1031 (5th Cir. 1993); *Lilley v. BTM Corp.*, 958 F.2d 746, 755 (6th Cir. 1992); *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1336 (7th Cir. 1987), cert. denied, 485 U.S. 1007 (1988); *Hultgren v. County of Lancaster*, 913 F.2d 498, 509 (8th Cir. 1990); *Schmitz v. Commissioner*, 34 F.3d 790, 793 (9th Cir. 1994); *EEOC v. Prudential Federal Savings and Loan Association*, 763 F.2d 1166, 1174 (10th Cir.), cert. denied, 474 U.S. 946 (1985); and *Joiner v. City of Macon*, 814 F.2d 1537, 1539 (11th Cir. 1987).

With its focus only on whether “willfulness” is essential to an award of liquidated damages, *Thurston* simply observes that liquidated damages serve a punitive function. *Thurston* did not concern, and does not intimate, whether liquidated damages under the ADEA simultaneously serve the compensatory function of indemnifying employees for prejudgment delays in recouping their back pay.

...
[W]hile liquidated damages serve a *deterrent or punitive function*, Congress also intended liquidated damages to serve as *compensation* for a discharged employee’s non-pecuniary losses arising from the employer’s willful misconduct.

Powers, 915 at 41, 42 (emphasis in original), quoting *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989). The legislative history of the 1978 amendments to the ADEA also belies petitioner’s reading of the Portal-to-Portal Act and the ADEA. H.R. Rep. 95-950 (conf.) at 13, 14 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 528, at 535.

Petitioner’s reliance on the mere enactment of the Portal-to-Portal Act is misplaced. By providing employers with an opportunity²⁷ to reduce their liability for liquidated damages, the 1947 law was attempting to relieve employers and the national economy of “wholly unexpected liabilities, immense in amount and retroactive in operation” 29 U.S.C. § 251(a). In so doing, the Portal-to-Portal Act converted the standard of liability for FLSA liquidated damages from strict liability to a statutorily-defined “reasonable

²⁷ The ultimate determination of whether the employer should be relieved of liability for FLSA liquidated damages is still within the “sound discretion” of the court. 29 U.S.C. § 260; *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982) (Equal Pay Act).

employer" standard. However, that does not mean FLSA liquidated damages thereby became punitive, any more than the existence of a reasonable person standard converts tort damages under the common law of negligence into a punitive remedy. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts*, § 30 (5th ed. 1989).

Petitioner's single, lodestar case interpreting the tax treatment of ADEA damages raises more questions than it answers. See *Downey*, 33 F.3d 836. The Seventh Circuit did not cite the prior decisions of the Fifth Circuit²⁸ and made no attempt to deal with this Court's full analysis in *Burke*, ignoring the role of jury trials as if it had determined *sub silentio* this Court's discussion to be an irrelevancy. Instead, *Downey* misconstrued *Burke* to require the existence of separate compensation for intangible injury as a necessary condition for excluding personal injury damages. 33 F.3d at 839, 840. Continuing its disregard for the teachings of this Court, the Seventh Circuit did not even cite *Thurston*, much less reconcile with it *Downey*'s apparent equation of ADEA liquidated damages with prejudgment interest, 33 F.3d at 840, or the Seventh Circuit's view of ADEA liquidated dam-

²⁸ *Downey*'s analysis seems to have been colored by its mistaken perception that no other post-*Burke* appellate courts had ruled on the tax treatment of ADEA damages, see 33 F.3d at 838, an unfortunate lapse if true, because the court might have made a more thorough inquiry if it had known of the issuance of *Purcell* and *Schleier* from a circuit otherwise sympathetic to the Seventh Circuit's view that ADEA liquidated damages preclude the recovery of prejudgment interest. Compare *Fortino v. Quasar Co.*, 950 F.2d 389, 397-398 (7th Cir. 1991), with *McMann v. Texas City Refining, Inc.*, 984 F.2d 667, 673 (5th Cir. 1993).

ages as a contractual remedy.²⁹ However, the ADEA imposes a "duty not to discriminate . . . regardless of the parties' contractual relationship; ADEA applies not only to firing and promotion decisions, but also to hiring decisions, when no contract exists." *Schmitz*, 34 F.3d at 793. Unlike contract damages, ADEA liquidated damages are not "liquidated in the contract." *Restatement (Second) of the Law of Contracts* at § 356 (1979).

Petitioner fails to heed this Court's jurisprudence concerning compensation and punishment. Contending that ADEA liquidated damages have no compensatory function and that they are not "on account of" the discrimination victim's injury, the government is attempting to resurrect the unrealistic conception of punitive damages rejected in *Molzof v. United States*, 112 S.Ct. 711 (1992), where it had argued that the standard for identifying punitive damages under the Federal Tort Claims Act, see 28 U.S.C. § 2674, was whether such "damages . . . are in excess of, or bear no relation to, compensation. . . . In the government's view, there is a strict dichotomy between compensatory and punitive damages" 112 S.Ct. at 715. This Court declined to equate "punitive damages" with "damages that have punitive effect," explaining: "[D]amages that are not legally considered 'punitive damages,' but which are for some reason above and beyond ordinary notions of compensation [are] in the 'gray' zone [and] are not by definition 'punitive damages'" 112 S.Ct. at 716. In doing so, *Molzof* anticipated the potential misuse of the government's argument in the context of ADEA liquidated damages:

²⁹ Ironically, by invoking the "difficult to prove losses" standard, *Downey* also placed itself at odds with petitioner's argument that the Portal-to-Portal Act and the enactment of the ADEA left no room for the "anachronistic error" of relying on *Brooklyn Savings Bank and Overnight Motor Transportation Co., Inc.*

The Government's reading of the statute also would create problems in liquidated damages cases and in other contexts in which certain kinds of injuries are compensated at fixed levels that may or may not correspond to a particular plaintiff's actual loss.

112 S.Ct. at 717.

Petitioner's oversimplistic dichotomy strictly separating compensatory from punitive damages finds no support in the teachings of this Court. Just as a remedial scheme may have dual goals of deterrence and compensation, *see McKennon*, slip op. at 5 ("The private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA."), so, too, may a specific remedy. "To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." *Carey v. Phipps*, 435 U.S. 247, 256-257 (1978). "Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory*" *Memphis Community School Dist.*, 477 U.S. at 307 (emphasis in original). "Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations." *Id.* at 310. This Court's prior analyses are consistent with that of the Ninth Circuit Court of Appeals:

In enacting ADEA, Congress was likely attempting to balance the need to compensate victims and deter discrimination with the need to protect businesses from crushing liability. Unlike the concurrence, we see nothing "peculiar" in Congress's decision to resolve these competing interests by compensating victims of willful discrimination at a higher rate than victims of non-willful discrimination: Congress has simply decided as

a public policy matter that only victims of willful discrimination should receive obscure and difficult to prove compensatory damages.

Schmitz v. Commissioner, 34 F.3d at 795.

B. Petitioner's Various Erroneous and Inconsistent Positions Impose an Incoherent, Unworkable, and Unfair Test for Applying Section 104(a)(2).

Petitioner historically has had difficulty sustaining a coherent explanation of how Section 104(a)(2) or its predecessors should be applied. For example, the Internal Revenue Service has entertained differing views as to whether damages for non-physical injuries are taxable;³⁰ whether punitive damages in tort cases are excludable from income;³¹ and whether FLSA liquidated damages are compensatory or penal.³²

In fact, petitioner has been unable to maintain a consistent view on ADEA damages in this case. Petitioner's claim that ADEA back pay "and *liquidated damages compensate* for economic losses . . ." Pet. Br. at 17 (emphasis added),³³

³⁰ Compare Sol. Op. 132, I-1 C.B. 92 (1922), superseded by Rev. Rul. 74-77, 1974-1 C.B. 33, and VII-1 C.B. 14, with Sol. Mem. 957, 1 C.B. 65 (1919), and Sol. Mem. 1384, 2 C.B. 71 (1920).

³¹ Compare Rev. Rul. 58-578, 1958-2 C.B. 38, and Rev. Rul. 75-45, 1975-1 C.B. 47, with Rev. Rul. 58-418, 1958-2 C.B. 18, and Rev. Rul. 84-108, 1984-2 C.B. 32.

³² Compare Rev. Rul. 69-581, 1969-2 C.B. 25, with Pet. Br. at 21-24.

³³ It is not clear whether petitioner thereby intends to resuscitate the argument that liquidated damages under 29 U.S.C. § 216(b), when cross-referenced by the Equal Pay Act, "are in the nature of interest on the back pay," a view rejected by the Fourth Circuit in *Thompson v. Commissioner*, 89 T.C. 632, 648 (1987), *aff'd*, 866 (continued...)

contradicts her assertion that "ADEA liquidated damages . . . are not compensatory," Pet. Br. at 20, as well as her statement before the Fifth Circuit Court of Appeals that "[i]n candor, we believe that the correct view is that ADEA liquidated damages are strictly punitive." *Schleier v. Commissioner*, 5th Cir. No. 93-5555, Brief for the Appellant at 27 n. 15; see also *Schmitz*, 34 F.3d at 793 ("The Commissioner argues that ADEA liquidated damages represent only punitive damages . . ."). Petitioner's schizophrenic view of ADEA liquidated damages also undermines her criticism of the Fourth Circuit for recognizing a dual compensatory/punitive role for liquidated damages. Pet. Br. at 26 n. 17. Petitioner's claim that "liquidated damages" are a remedy for breach of contract, see Pet. Br. at 21 n. 11, in support of which she cites a non-ADEA case, *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148 (1956), cannot be reconciled with her contentions that ADEA liquidated damages are exclusively punitive. Contractual remedies do not allow for punitive damages. *Restatement (Second) of the Law of Contracts*, § 356, comment a (1979).

In light of these past and present inconsistencies, no special deference should be accorded to the petitioner here, should any be claimed. Deference "to agencies' 'reasonable' interpretations of their own statutes, . . . cannot be invoked where an agency is still considering what interpretation it will ultimately adopt." *Conecuh-Monroe Community Action Agency v. Bowen*, 852 F.2d 581, 586 (D.C. Cir. 1988).

Nor is the administrative interpretation, having been arrived at more than 60 years after the adoption of the statute, either contemporaneous [citations omitted] or

long standing [citations omitted]. Finally, the agency's interpretation has not been consistent. [Citations omitted.]

...

[I]nconsistent agency pronouncement hardly adds weight to the interpretation of the Act the Commission now urges on the court.

F.T.C. v. Miller, 549 F.2d 452, 457, 459-460 (7th Cir. 1977). Indeed, the Internal Revenue Service is entitled to no deference whatsoever in its interpretations of a statute which it does not administer. *Department of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988); accord, *Dept. of Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1410 (3d Cir. 1988).

Petitioner's all-or-nothing test would deny the Section 104(a)(2) exclusion to any remedial scheme that does not offer a complete spectrum of tort recoveries, see *Bennett*, 30 Fed. Cl. at 400, or that does not include standalone causes of action permitting the recovery of damages for intangible injuries. Not only is this extremism alien to *Burke*; it will discourage states in their roles as social laboratories from engaging in "novel social and economic experiments," see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), as they proceed with tort reform initiatives limiting recoveries for pain, suffering, and other intangible injuries, as well as punitive or exemplary damages.³⁴ Jurisdictions that reduce tort recoveries while re-

³³ (...continued)

F.2d 709 (4th Cir. 1989). Interest on a fixed sum is one of the easiest damage measures to calculate.

³⁴ See e.g., Ohio Rev. Code § 2744.05 (1992) (victims of tortfeasors that are "political subdivisions" may not recover punitive or exemplary damages, or damages for "pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss"). "The purpose of [this provision] is to per-

(continued...)

taining a tort framework³⁵ are entitled to rely on the Treasury Regulation's linkage of excludable personal injury damages to "torts or tort type rights."³⁶ However, petitioner's all-or-nothing theory subverts the regulation by threatening a federal tax (and also, usually, a state tax) on tort victims who receive reduced "tort-type" damages but who are not otherwise being singled out by the state for adverse tax treatment. Similarly, states experimenting with damage limitations in restitutionary payments³⁷ and wishing to rely on the exemption from federal income tax extended to certain victim restitution payments, *see* Rev. Rul. 74-74,

³⁴ (...continued)

mit recovery by injured persons for *torts* committed by political subdivisions while at the same time conserving the fiscal resources of those political entities." *Galanos v. City of Cleveland*, 70 Ohio St. 3d 220, 221, 638 N.E.2d 530, 532 (1994) (emphasis added).

³⁵ *See, e.g.*, Colo. Rev. Stat. § 13-10-101; compare *Burke*, 112 S.Ct. at 1877 (Souter, J., concurring).

³⁶ By incorporating "tort or tort-type rights" into its test, the regulation brings concepts from the common law and state statutes into what might otherwise be an exclusively federal determination, thereby ceding a function of the federal tax law to state-based processes and implicitly acknowledging the possibility that states may change their tort laws.

[T]he use of the terms "damages" and "personal injury" by Congress necessarily implies that the exclusion under sec. 104(a)(2) depends, to some degree, upon classifications under State law. This is confirmed by use of the term 'tort or tort type rights' in the regulations under sec. 104(a)(2).

Threlkeld, 87 T.C. at 1306 n. 6.

³⁷ *See, e.g.*, Iowa Code § 910.1 ("pecuniary damages" recoverable by a victim against an offender do not include punitive damages or damages for pain, suffering, mental anguish, or loss of consortium); N.M. Stat. Ann. § 31-17-1 ("actual damages" recoverable by a victim shall not include punitive damages or damages for pain, suffering, mental anguish, or loss of consortium).

1974-1 C.B. 18 (not explicitly referring to Section 104(a)(2)),³⁸ are left without guidance in assessing whether their reforms will penalize their intended beneficiaries. "Such a trend will only thwart state searches for better solutions in an area where this Court should encourage state experimentation." *Santosky v. Kramer*, 455 U.S. 745, 773 (1982) (Rehnquist, J., dissenting).

More generally, petitioner's litigating position, if elevated to a rule of law, would confront victims, employers, and courts with great administrative difficulties. The uncertainty of predicting tax effects under petitioner's result-driven theories would increase the transaction costs and the economic burdens of settlements and send more taxpayers to the courts.³⁹ Courts adjudicating tax issues would be forced to relitigate settled civil disputes in order to disentangle overlapping claims. Given the position of Rev. Rul. 93-88, 1993-2 C.B. 61, permitting tax-free recoveries of various damages under Title VII of the Civil Rights Act of

³⁸ *See, e.g.*, Or. Atty. Gen. Op. (June 30, 1986), reprinted in 1986 Ore. AG LEXIS (compensation under Or. Rev. Stat §§ 147.005 - 147.415 to certain crime victims, relatives, and dependents, held excludable from Oregon taxable income in reliance on Rev. Rul. 74-74).

³⁹ As an example of the chaotic repercussions of petitioner's Portal-to-Portal Act theory even beyond Section 104(a)(2), query whether petitioner's revocation of the *ratio decidendi* of Rev. Rul. 69-581 upsets the reasonable expectations of employers who might otherwise have relied on that ruling in deducting their FLSA settlement payments. Petitioner's departure from Rev. Rul. 69-581, which violates the invitation to rely on rulings extended by Rev. Proc. 89-14, 1989-1 C.B. 814, now injects into every settlement negotiation involving governmental payees or disbursing agents the risk that petitioner may treat FLSA or ADEA liquidated damages as nondeductible fines or penalties. *See* Code § 162(f) (added by Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, § 902, applicable to all taxable years to which the 1954 Code applies); Treas. Reg. § 1.162-21.

1964, 42 U.S.C. §§ 1981a, 2000e-2000e-17, the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, and Section 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981, the taxation of ADEA plaintiffs would create an economic incentive for victims of discrimination to forego a remedy provided by Congress and skew their pleadings and settlements toward other laws, frustrating the legislative policy of the ADEA.

III.

ADEA LIQUIDATED DAMAGES ARE NOT INCLUDABLE IN INCOME AS PUNITIVE DAMAGES UNDER SECTION 104(A)(2).

Petitioner's alternative argument contemplates the possibility that this Court may find that a lawsuit under the ADEA is an action involving tort or tort-type rights, so that damages under the ADEA on account of personal injuries are excludable from gross income. Recognizing that such an outcome would lead to the exclusion of Mr. Schleier's lost earnings from his gross income, *see* Rev. Rul. 93-88, 1993-2 C.B. 61, petitioner nevertheless maintains that ADEA liquidated damages should be taxed, on the ground that they were not received "on account of" the injury of discrimination.

1. We have already demonstrated that ADEA liquidated damages serve a partially compensatory role, reflecting their origins in the compensatory liquidated damages of the FLSA, *see Brooklyn Savings Bank*, 324 U.S. 697; *Overnight Motor Transportation Co., Inc.*, 316 U.S. 572; *Powers*, 915 F.2d 34; *Schmitz*, 34 F.3d 790. ADEA liquidated damages are thus distinguishable from those "damages awarded as punishment of a wrongdoer, *rather than* as compensation for an injury," Pet. Br. at 26 (emphasis added), toward which petitioner's alternative argument is directed. By compensating for consequential damages attendant upon the

injury of discrimination, ADEA liquidated damages are necessarily "on account of"⁴⁰ personal injury.

Unlike exclusively punitive damages in tort cases, which may be awarded in proportion to a defendant's bad behavior, even though the plaintiff receives nominal compensatory damages, ADEA liquidated damages may not be awarded unless the victim has shown an entitlement to lost earnings or back pay. 29 U.S.C. § 216(b). Congress thus required the injury of discrimination to be proven before the victim may receive ADEA liquidated damages. Moreover, the magnitude of the injury, rather than the degree of culpability on the part of the defendant, determines the amount of ADEA liquidated damages. Thus, in Mr. Schleier's case, two victims of United's age discrimination policy receiving dissimilar amounts of lost earnings would have received proportionally dissimilar amounts of ADEA liquidated damages, even though United's company-wide policy was "equally willful" toward all over-60 employees.

The courts on which petitioner relies for her major premise—that punitive damages without a compensatory function are not excludable from income even if they arise in cases of personal injury—reject her minor premise—that ADEA liquidated damages only punish. *See Miller*, 914 F.2d 586, and *Reese*, 24 F.3d 228. The Fourth Circuit had previously held that liquidated damages under the Equal Pay Act were excludable from income because they had compensatory and punitive functions. *Thompson v. Commissioner*, 866 F.2d 709 (4th Cir. 1989). *Miller* reaffirmed that view, "not[ing] further that nothing in our analysis is inconsistent

⁴⁰ "On account of" has traditionally meant "in consideration of, for the sake of, by reason of, because of." 1 *Oxford English Dictionary* 86 (2d Ed. 1989).

with the case law that has developed around § 104(a)(2).” 914 F.2d at 591. The court was impelled to add:

Nor is there any inconsistency between on the one hand, our decision to distinguish compensatory relief from punitive relief and, on the other hand, the proposition that courts should not distinguish, for section 104(a)(2) purposes, among the kinds of injurious consequences flowing from a defendant’s invasion of a plaintiff’s tort type right. *See, e.g., Rickel v. Commissioner*, 900 F.2d 655, 657-664 (3d Cir. 1990) ([ADEA] damages for economic harm flowing from a tortious injury as equally excludable as damages for physical harm).

914 F.2d at 591 n. 8. Like this Court, which took note of *Rickel* in *Burke*, *see* 112 S.Ct. at 1871 n. 6, the Fourth Circuit should be presumed to have understood the authority it was citing.

Reese cited *Miller* with sympathy and relied on a similar distinction between solely punitive damages and damages that have a compensatory function. In *Reese* the taxpayer had tried to blur the difference between her purely punitive damages and other taxpayers’ ADEA liquidated damages in order to argue for extending the favorable decisions in *Pistillo* and *Redfield* to her facts. 24 F.3d at 234. Specifically commenting on the prior decisions of courts of appeals holding that ADEA damages are excludable under Section 104(a)(2), the Court of Appeals for the Federal Circuit stated:

To the extent [*Redfield* and *Pistillo*] dealt with the excludability of damages received, they dealt only with compensatory damages, not punitive damages. *See Redfield*, 940 F.2d at 544; *Pistillo*, 912 F.2d at 147.

Id. The *Reese* court’s rejection of the taxpayer’s contention in that case applies equally to the position advanced by petitioner as her alternative argument before this Court.

Furthermore, the court would not have cited and distinguished *Pistillo* and *Redfield* if it agreed with the view of petitioner in the case at bar that *Burke* implicitly overruled all prior decisions on the tax treatment of age discrimination.⁴¹

2. By attempting to style ADEA liquidated damages as exclusively punitive, petitioner is inviting the Court to resolve a question beyond the scope of Mr. Schleier’s case, concerning which courts are in disagreement. *Compare Hawkins v. United States*, 30 F.3d 1077; *Reese*, 24 F.3d 228, and *Miller*, 914 F.2d 586, with *Horton v. Commissioner*, 33 F.3d 625 (6th Cir. 1994).

The excludability of purely punitive tort damages rests on the plain language of Section 104(a)(2): “any damages received . . . on account of personal injuries” (emphasis added). At one time the Internal Revenue Service itself favored the view that punitive damages in tort cases are excludable from income under Section 104(a)(2), observing that “[t]here is nothing in the legislative history of Code § 104 or the regulations thereunder indicating that punitive damages awarded in connection with personal injuries should be includible in gross income,” and concluding “the compensatory vs. punitive distinction is not relevant to damages within Code § 104(a)(2).”⁴² The agency also believed that the holding of Rev. Rul. 58-578, 1958-2 C.B. 38, was broad enough to encompass the finding that damages under any wrongful death statute, whether punitive or compensatory, were excludable from income.⁴³

⁴¹ *Schleier*, 5th Cir. No. 93-5555, Brief for the Appellant at 13-14.

⁴² G.C.M. 35967 (August 27, 1974), 1974 IRS GCM LEXIS 140, at *4 n.1, *7; cf. *Rowan Companies*, 452 U.S. at 261 n. 17.

⁴³ G.C.M. 35967, 1974 IRS GCM LEXIS at *12. Illustrating the agency’s continuing ambivalence, G.C.M. 37398 (January 31, (continued...))

The Tax Court holds punitive tort damages excludable:

The beginning and end of the inquiry should be whether the damages were paid on account of "personal injuries." This inquiry is answered by determining the nature of the underlying claim. Once the nature of the underlying claim is established as one for personal injury, any damages received on account of that claim, including punitive damages, are excludable.

Horton v. Commissioner, 100 T.C. 93, 96 (1993), *aff'd*, 33 F.3d 625 (6th Cir. 1994). In affirming this decision, the Court of Appeals for the Sixth Circuit adopted the Tax Court's understanding, supported by *Burke*, that punitive damages are "inextricably bound up" with the concept of tort type rights, . . . and therefore one of the prime determinants of whether a claim is for personal injury." 33 F.3d at 630;⁴³ *see also Hawkins*, 30 F.3d at 1085-86 (Trott, J., dissenting):

The [*Burke*] Court described the availability of punitive damages as one of the indicia of traditional tort liability. *Id.* The Court then relied upon the unavailability of punitive damages in a Title VII case to hold that Title VII does not redress a tort-like personal injury. *Id.* at 1873. The Supreme Court stated that "the concept of a 'tort' is inextricably bound up with remedies," including punitive damages. *Id.* at 1872 n.7.

⁴³ (...continued)

1978), 1978 IRS GCM LEXIS 429, conceded that the exclusion of punitive wrongful death payments was "based on a plausible interpretation of the statutory language," *Id.* at *12. It observed that the word "any" was "broad enough to cover punitive as well as compensatory damages," and noted that the tax-free treatment had the "desirable effect of creating uniformity in the treatment of damages received under the wrongful death statutes of the various states." *Id.* Nonetheless, the agency concluded taxation was more appropriate.

⁴⁴ The Sixth Circuit also noted that the punitive damages in *Kentucky* had a compensatory aspect. 33 F.3d at 631.

This Court's observation in *Burke* that in 1989 "Congress amended § 104(a) to allow the exclusion of *punitive damages* only in cases involving 'physical injury or physical sickness,'" 112 S.Ct. at 1871 n. 6 (emphasis in original), lends further support to the exclusion from income of purely punitive tort damages in taxable years before the effective date of the 1989 amendment. In cases of punitive damages involving physical injuries or physical sickness, the 1989 legislation preserved the pre-existing tax treatment of general punitive tort damages.

Congress should be presumed not to have acted irrationally when it subdivided the pre-1989 tax concept of "punitive damages" under Section 104(a)(2), differentiating between (i) punitive damages arising in a case not involving physical injuries or physical sickness and (ii) punitive damages arising in a case involving such injuries or sickness, and making no change in the law applicable to the latter. It would have made no sense for Congress to change the tax treatment of punitive damages in non-physical injury cases while leaving unsettled the tax treatment of punitive damages in physical injury cases. "Quite obviously, reenacting precisely the same language would be a strange way to make a change." *Pierce v. Underwood*, 487 U.S. 552, 567 (1988). Just as "[t]he enactment of this limited amendment addressing only punitive damages shows that Congress assumed that other damages (*i.e.*, compensatory) would be excluded in cases of both physical *and* nonphysical injury," 112 S.Ct. at 1871 n. 6 (emphasis in original), so the undisturbed, tax-free treatment of punitive damages in cases involving physical injuries or sickness indicates that the pre-amendment treatment of all punitive tort damages was the same.

Finally, the holdings in *Miller*, *Reese*, and *Hawkins* supporting the taxation of purely punitive tort damages must be regarded with skepticism, because they all relied on the

return of capital metaphor in order to justify the denial of the Section 104(a)(2) exclusion to exclusively punitive tort damages. *See Miller*, 914 F.2d at 590; *Reese*, 24 F.3d at 233 (“punitive damages in no way resemble a *return* of capital”) (emphasis in original); *Hawkins*, 30 F.3d at 1084 (“[i]n [these] circumstances, the restoration of capital rationale underlying § 104(a) is simply inapplicable”). We have already shown how that rationale fails generally.⁴⁵

CONCLUSION

The decision of the Fifth Circuit Court in Appeals, as amplified by that of the Ninth Circuit Court of Appeals in *Schmitz v. Commissioner*, 34 F.3d 790, should be affirmed.

Respectfully submitted,

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⁴⁵ See pp. 21-24, *supra*.